of that sort appeared in the second paragraph. The two parts of the act of 1912 in question, the one dealing with "conveyances" and "agreements," the other regarding adverse possessions, were both contained in one section, though in separate paragraphs. The first paragraph used the expression "heretofore made," and under that provision, if Congress had stopped there, the court would have undoubtedly held, following the *Ely* case, that a prior adverse possession for the statutory period had conferred title upon the possessor. But Congress went on, in the same section, and mentioned expressly adverse possession, omitting the word "heretofore." No language, however, expressly looking to the future was used. Admittedly, as the court said, it was a question of construction as to whether the adverse possession paragraph was intended to speak to the past or to the future. By applying the general rule that statutes should, unless it appears that the intention was otherwise, be construed as operating prospectively, the court concluded that the provision in question looked to the future. It is submitted that the history of the legislation, the construction given to the act of 1904, and the wording of the whole of § 1 of the act in question showed a contrary intention, and that the lower court was right. R. W. A.

RECOVERY OF SALARY BY DE FACTO OFFICER WHERE THERE IS NO OTHER CLAIMANT.—In two recent cases, *State ex rel. Kleinsteuber* v. *Kotecki* (Nov. 8, 1913), 144 N. W. 200 and *State ex rel. Elliott* v. *Kelly* (Oct. 7, 1913), 143 N. W. 153, the Supreme Court of Wisconsin considered the question of the right of the de facto officer to recover the salary of his office, and held that where there is no other claimant and the de facto officer has taken possession of the office in good faith he is entitled to the salary attached to the office. In each case the question arose in a mandamus action to compel the disbursing officers of a city to take certain steps in payment of the salary attached to a city office. The opinion in the later case contains no general discussion of the de facto officer's right to salary. It contains simply an assertion of the right and refers to the earlier case for authority for the principle. In the earlier case, *State v. Kelly,* on this point Justice MARSHALL in his opinion said, "We agree with counsel that such (that the de facto officer who takes possession of the office in good faith, where there is no other claimant, is entitled to the salary) is the rule by the better, if not the weight of, authority. We decline to follow the lead of courts which deny the right to compensation to officers de facto who have, in good faith, performed the duties of a de jure office, when there is no other person who, under any circumstances, can properly claim the salary incident. The salary of an office is an incident thereto and not, necessarily, an incident to service by a de jure incumbent. Therefore, in case of the incumbency being, in good faith by an officer de facto, and (no) adverse claimant, there is no justice in denying to the occupant the compensation incident to the place during such incumbency if the corporation is willing to grant it."

The court, in this case, evidently disregards the quite generally accepted principle of the law of public officers that the basis of the officer's right to

salary is not services performed, not contract, but title to the office; the court disregards also the primary principle of the de facto doctrine that it is not a quality of the incumbent of the office and does not create any right in, or protect him, but that it is a doctrine for the protection of third parties, who deal with the incumbent in good faith as the de jure officer, adopted in order to facilitate the conduct of the public business.

The desire to reach a result in this particular case which would work no hardship on one who honestly and in good faith had performed services for the public undoubtedly influenced the court to decide for the plaintiff. If the incumbent was the de facto, rather than the de jure officer it was either because he was not a citizen of the state at the time of his appointment or because he negligently failed to qualify by filing his oath of office until after the termination of the prescribed period. If the statutes of the state should be interpreted as requiring either or both of these as requisite to the de jure officer (and this the court did not decide) the effect of permitting plaintiff to recover the salary of the office, which he thus wrongfully attempted to fill, is practically to override the will and intent of the legislature in prescribing such requirements. The tendency of such a decision will be, if not to encourage fraud, at least to invite carelessness on the part of candidates for office in looking after their eligibility and in qualifying for office after elected. Thus the purpose of the legislature in requiring rules of eligibility and certain steps to be taken in qualifying for the office will be defeated. No such result is reached by a correct application of the de facto doctrine, for when so applied it protects the public, but does not aid the honest though mistaken claimant of the office in asserting rights which are not his.

In this case the claimant, though perhaps honest, was not without fault for he negligently failed to file his oath. It is a novel doctrine, indeed, that one who, though acting with good intentions, has negligently failed to take certain steps necessary to complete his title may still recover as though he had title. In this respect the court here has gone much farther than the courts in those cases which have hitherto recognized the de facto officer's right to salary where there is no other claimant. Here the negligence which prevented the claimant from becoming the de jure officer was his own, in the other cases in which the same principle has been declared the negligence has been that of another. See *Peterson* v. *Benson,* (1910), 38 Utah 286, 112 Pac. 801; *Elledge* v. *Wharton* (1911), 89 S. C. 113, 71 S. E. 657; *Behan* v. *Davis* (1892), 3 Ariz. 399, 31 Pac. 521; *Adams* v. *Directors* (1895), 4 Ariz. 327, 40 Pac. 185; where the negligence was that of the appointing officers. But see *Cousins* v. *Manchester* (1892), 67 N. H. 229, 38 Atl. 724.

The courts in the cases just cited refuse to apply the generally accepted principles of the de facto doctrine and of the officer's right to salary to the facts before them because they felt that it would be "inequitable" (used in a popular sense) to do so as by so doing a hardship would be imposed on the claimants through no fault of their own. Now comes the Wisconsin Court and for the same reason of hardship to the claimant extends the application of this "equitable rule" to a case where the officer, though acting with good intentions, was negligent. Will the process go on? There are still many other

instances in the application of the de facto doctrine where it has worked hardship to the claimant in good faith to which the "equitable rule" might be extended without the application being more illogical than its present use. (See article—RECOVERY OF SALARY BY DE FACTO OFFICER—10 MICH. L. REV. 178-186, 291-299, for a general discussion of the subject.) These decisions do remove the hardship from the honest claimant but they place it on the public. The state's burden of enforcing rules regarding eligibility and qualification is made much heavier by removing the officer's self-interest in the matter. At a time when the sentiment for a higher standard of fitness for public office is growing in strength, any decision of our courts which tends to create a lighter regard for the laws by which we secure this standard is much to be regretted. It is an old saying that "hard cases make bad law" and the cases mentioned furnish an apt illustration of the maxim. It is to be hoped that other courts in examining these phases will see the uncertainty and ultimate injustice that they have injected into the law of the subject and will not be tempted to follow them in order to prevent a hardship to a well-intentioned though careless claimant. G. S.

THE RIGHT TO DIVERT WATER TO NON-RIPARIAN LANDS.—Though at one time in England there may have been some doubt as to the character of a riparian owner's rights in the waters of the stream, it must be considered as definitely settled by a series of cases that the doctrine of reasonable use by all the proprietors on the stream is the rule of the common law, and that the matter of priority of use or appropriation is, under that system, immaterial, unless, of course, a question of prescriptive right is involved. *Wright* v. *Howard,* 1 Sim. & S. 190; *Mason* v. *Hill,* 3 B. & Ad. 304, 5 id. 1; *Wood* v. *Waud,* 3 Exch. 748; *Embrey* v. *Owen,* 6 Exch. 353; *Sampson* v. *Hoddinott,* 1 C. B. (N. S.) 590, *Miner* v. *Gilmour,* 12 Moore P. C. 131. The American courts have generally adopted the view of the law early expressed by Chancellor KENT, which is the view approved by the English courts above referred to. See 3 KENT, COMM. *439. The rule of law is clear, the difficulties arise in its application to particular cases in the determination of the question as to whether a certain use is reasonable or not. In the second edition of his splendid treatise on IRRIGATION AND WATER RIGHTS, Mr. KINNEY has said: "Under the common law there are three classes of uses which the riparian proprietors may or may not make of the waters of a stream flowing by their lands. These are: First, natural or primary uses for which any riparian proprietor may take the waters of the whole stream; second, artificial uses or uses which are not classified as those for natural wants; and, third, uses of the water which may not be made at all; such, for example, would be the use of water by a riparian owner upon non-riparian lands." § 486.

In the first class of uses mentioned by Mr. KINNEY in which the water is used for the so-called primary or ordinary or natural purposes, it has been said by a great many courts that it is not unreasonable to abstract water to such an extent that in the case of small streams the supply is entirely exhausted. *Miner* v. *Gilmour,* supra; *Swindon Water Works Co.* v. *Wilts &*